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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**



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DATE: DEC 15 2011

Office: CALIFORNIA SERVICE CENTER

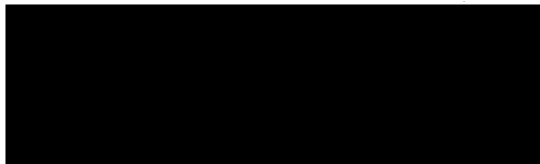
FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will sustain the appeal and approve the petition.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a [REDACTED] company established in May 1999, states that it operates a worldwide business in the production, marketing, and distribution of premium wines. The petitioner claims to be the parent company of [REDACTED] in Casablanca, Chile. The petitioner seeks to employ the beneficiary from September 2009 to August 2011 to serve in the position of Marketing Director, [REDACTED]

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been or will be employed in a primarily executive or managerial capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director's decision contains several errors of law and fact. Counsel solely submits a brief in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on August 19, 2009. The petitioner indicated on the Form I-129 that it operates a worldwide business in the production, marketing, and distribution of premium wines with 50 current employees and a gross annual income of \$33M. In support of the petition, the petitioner submitted a letter describing the duties of the beneficiary as follows:

As the Marketing Director for [REDACTED] [the beneficiary] will continue to be responsible for the essential function of brand development and marketing in the United States and Canada. She supervises a team of professional marketing and sales staff who make up the brand teams and she will continue to exercise managerial control over these personnel, including task assignments and performance reviews. She will continue to operate at a senior level and receive only general direction from the President, the Proprietor and other executives. [The beneficiary] will continue to report directly to [the petitioner's] Director of Marketing & Communications. In addition, she will continue to exercise discretionary authority over day-to-day operations of her sales and marketing teams, including a budget, authorizing expenditures, revision of contracts and, together with the Director, President and Proprietor, she will participate in management level decision making, including setting goals and objectives and the hiring, training, promotion and/or firing of personnel.

The petitioner provided a lengthy description of the beneficiary's duties, noting that she will "develop and execute sales strategies for the [REDACTED] in the U.S. market," "develop, execute and monitor marketing plan for [REDACTED] based [in] Chile," and "supervise a sales and marketing coordinator who is based [in the U.S. office]."

The petitioner also provided an organizational chart for the U.S. company illustrating that it employs 24 individuals in four divisions. The marketing and communications division employs six individuals including the beneficiary. The beneficiary is listed as the marketing director supervising three [REDACTED] and one sales and marketing coordinator.

The director issued a request for additional evidence ("RFE") on August 21, 2009, instructing the petitioner to submit, *inter alia*, the following: (1) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees she supervises; (2) a more detailed description of the beneficiary's duties indicating exactly whom the beneficiary directs and the percentage of time the beneficiary spends performing each of the listed duties; and (3) evidence of wages paid to the beneficiary's subordinate employees.

In response to the RFE, the petitioner provided the following description of the beneficiary's duties for the U.S. company:

The Marketing Director has primary managerial responsibility for promotion and sales of our Chilean [REDACTED] brands, including our premium icon [REDACTED] [The beneficiary] supervises a U.S. based Sales and Marketing Coordinator who carries out her functions at the direction of the marketing Director. She also supervises a team of 4 to 8 [REDACTED] who are based in Chile and who travel throughout the United States

promoting the brands and working directly with distributors throughout the country. She has direct reporting responsibilities to [the petitioner's] Communication and Marketing Director who oversees all of the marketing strategies for the entire [petitioner's] line of products.

The Marketing Director has the following specific managerial responsibilities:

1. Marketing Strategies Approximately 30%
2. Branding, Pricing, etc. Approximately 15-25%
3. Budget Approximately 10%
4. Personnel decision-making Approximately 10%
5. Goals and Objectives/Sales Team Support Approximately 15%
6. Company representative Approximately 10%
7. Strategic planning Approximately 10%
8. Sales analysis Up to 5%

The petitioner further broke down the tasks associated with each of the duties listed above and provided copies of the beneficiary's sales and marketing plans for the last year. The petitioner also provided job descriptions for the beneficiary's subordinates along with resumes for each of the subordinates and sufficient evidence of wages paid to the subordinates. The petitioner indicated, and the evidence confirmed, that the sales and marketing coordinator is employed in the United States and the [REDACTED] employed in Chile.

The director denied the petition on October 8, 2009, concluding that the petitioner failed to establish that the beneficiary has been and will be employed in a primarily executive or managerial capacity. In denying the petition, the director found that the duties described are more indicative of an employee who is performing the necessary tasks to provide a service or to produce a product. The director further found that the petitioner has not shown that the beneficiary manages a department, subdivision, function, or component of the organization, but that she appears to be involved in the performance of routine operational activities. The director also observed that four subordinate employees of the beneficiary were listed on the organizational chart but three of the four were not identified on the petitioner's U.S. payroll.

On appeal, counsel submits a brief that states:

In support of this conclusion, the Director identifies 4 minor sub-duties as non-supervisory. These specific duties are part of a larger managerial responsibility (i.e., personnel-decision making) which together constitutes only 10% of the beneficiary's time. The Director's decision fails to show that he considered the other 90% of the beneficiary's duties, a majority of which are related directly to managing a major component of the petitioner's business.

There is no legal requirement for subordinate employees to be on the petitioner's U.S. payroll in order to be legitimately included in the petitioner's corporate hierarchy. In fact, these 3 employees are on the payroll of the Petitioner's wholly-owned Chilean subsidiary. Evidence verifying this employment, along with a copy of the job descriptions of each subordinate

employee, was provided in response to the Director's RFE. However, the Director ignored this evidence.

The evidence overwhelmingly supports the conclusion that the Beneficiary meets all of these criteria and, therefore, can easily be deemed a functional manager.

While the term "essential" is not defined by statute or regulation, it is commonly defined as "inherent" [or] "indispensable." *Webster's New College Dictionary* 392 (2008). Therefore, a petitioner must establish that the function managed is inherent and indispensable to the petitioner's operations rather than a non-essential or superfluous task.

In this regard, the evidence demonstrates that the Beneficiary manages a huge marketing function representing \$11.8 million of the Petitioner's business.

Further, the Beneficiary is part of the senior management team which includes the Petitioner's President and Director of Communications and Marketing. She is on the 2nd tier of the corporate hierarchy together with Sales Regional Managers. She exercises discretion over the day-to-day operation associated with the nearly \$12 million wine import business and has complete discretionary authority over a budget in excess of \$2 million. She also has the discretion to hire subordinate staff and independent contractors and to bind the Petitioner contractually.

Discussion

Upon review, counsel's assertions are persuasive. The AAO finds sufficient evidence to establish that the beneficiary will be employed in a primarily executive or managerial capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). Contrary to the director's observations, the petitioner has provided a comprehensive description of the beneficiary's duties sufficient to establish that her duties are primarily related to the management of the sales and marketing function of the petitioner's successful [REDACTED] and not to producing a product, providing a service, or performing other non-managerial functions. The evidence submitted also establishes that the beneficiary supervises and controls the work of subordinate professional employees and exercises authority to hire and fire employees under her supervision. *See* sections 101(a)(44)(A)(ii) and (iii) of the Act.

The AAO agrees with the petitioner's assertion that the beneficiary's overall management of the [REDACTED] brand marketing division, within the context of the petitioner's business organization, can be equated to managing a subdivision, function, or component of the organization. *See* section 101(a)(44)(A)(i) of the Act. Further, the beneficiary does not directly perform the routine sales and marketing functions carried out by the office. The AAO is satisfied that the beneficiary exercises discretion over the day-to-day operations of the [REDACTED] and marketing division, as required by section 101(a)(44)(A)(iv) of the Act.

In finding that the proffered position is not managerial in nature, the director refused to consider the beneficiary's subordinate staff located at the Chilean office. The AAO notes that the statutory definition of managerial capacity refers to an assignment within an organization in which the employee manages the organization or an essential function. The term "organization" is defined at section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28), as follows:

The term 'organization' means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

The statutory definition of an organization would not reasonably include a foreign corporation that is an entity separate and distinct from the petitioning organization. Here, however, the foreign corporation, [REDACTED] is not separate and distinct from the petitioner. The record contains documentary evidence that the petitioner and [REDACTED] are both affiliates owned and controlled by [REDACTED] (the petitioner). Both the petitioner and [REDACTED] are jointly engaged in the production, marketing, and distribution of premium wines. Accordingly, the U.S. company and the winery in Chile are permanently associated through ownership. Therefore, the beneficiary's management of the [REDACTED] on behalf of the petitioner may be considered when determining if the proffered position is in a managerial capacity.

The petitioner has submitted sufficient documentary evidence to establish the existence of the subordinate employees in Chile, that the beneficiary would continue to supervise the employees in Chile, and that she would have discretionary authority over personnel actions related to said employees. Additionally, the job descriptions provided for the employees in Chile are sufficient to establish that the supervised positions are professional in nature.

Furthermore, the AAO disagrees with the director's conclusion that the beneficiary's job duties – specifically those listed in the denial – are inherently operational and not managerial or executive in nature. Contrary to the director's conclusion, the petitioner provided a sufficiently detailed breakdown of the beneficiary's job duties that demonstrates that she will be performing in a primarily managerial capacity. The director focused on four sub-tasks listed under other managerial duties for the beneficiary. These sub-tasks, if taken separately, only amount to approximately 25% of the beneficiary's time.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties. Here, the petitioner has established that, at a minimum, the beneficiary primarily manages an essential function of the petitioning organization in addition to one employee in the United States and three employees in Chile. Given the overall purpose of the organization, the petitioner established a reasonable need for a marketing director at the U.S. company to oversee product sales and marketing for the [REDACTED] brand of the company.

While the beneficiary will undoubtedly be required to apply her expertise to perform some higher-level sales and marketing tasks, the AAO is persuaded that the beneficiary's subordinates in the United States and at the foreign entity will carry out the majority of the day-to-day non-managerial tasks required to operate the business. The petitioner need only establish that the beneficiary devotes more than half of her time to executive or managerial duties. The petitioner has met that burden.

III. Conclusion

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has met that burden. Accordingly, the director's decision dated October 8, 2009 is withdrawn and the petition is approved.

ORDER: The appeal is sustained.